THE STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF
THE RULES OF PROFESSIONAL CONDUCT

MEETING SUMMARY - OPEN SESSION

Friday, May 2, 2003
(9:30 am - 4:55 pm)

State Bar of California
1149 So. Hill Street, Room 723
Los Angeles, CA 90015
(213) 765-1000

MEMBERS PRESENT: Harry Sondheim (Chair); Karen Betzner [via video conference] Linda Foy; Ed George; JoElla Julien; Stanley Lamport; Raul Martinez; Ellen Peck; Hon. Ignazio Ruvolo [video conference]; Jerry Sapiro; Mark Tuft [video conference]; and Tony Voogd.

MEMBERS NOT PRESENT: Kurt Melchior; and Paul Vapnek.

ALSO PRESENT: Randall Difuntorum (State Bar staff); Luella Hairston (law student); Diane Karpman (Beverly Hills Bar Association Liaison); Kevin Mohr (Commission Consultant); Ira Spiro (State Bar ADR Committee Liaison); and Mary Yen (State Bar staff) [via video conference].

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM FEBRUARY 21-22, 2003 MEETING

The open session summary was approved, as amended. (See attached copy of revised summary.)

II. REMARKS OF CHAIR

A. Chair's Report

For those members who had not yet done so, the Chair asked that home phone numbers be provided to staff for the confidential member roster.

The Chair thanked members for exchanging e-mails on agenda items and encouraged members to continue with this practice as it will influence the Chair's discretion in managing meeting discussions.

The Chair reported on an inquiry received by Mr. Tuft from ABA staff. The ABA staff inquiry requests a meeting with representatives of the Commission to be held in connection with the August ABA Annual Meeting in San Francisco. It was the sense of the Commission that such a meeting was desirable and the Chair

and Mr. Tuft were assigned to respond to ABA staff and to develop an agenda for the meeting.

The Chair reported on a staff recommendation to begin work on RPC 3-600 as soon as possible in order to position the Commission to assist the Board in analyzing related policy issues, such as pending state legislation and the recommendations of the ABA Task Force on Corporate Responsibility. The Chair assigned the following codrafter team: Mr. Melchior (lead); Ms. Foy and Mr. Voogd to prepare an initial item for the Commission's July meeting.

The Chair reported on a staff recommendation to change the Commission's mail ballot process. Following discussion, it was agreed that mail ballot proposals would require objections from six members in order to bring a tentatively approved item back on the agenda for reconsideration.

On a related matter, the Chair indicated that two objections were received in response to the RPC 1-120 mail ballot and the Commission would discuss the rule for the limited purpose of possibly modifying the draft and restarting a mail ballot in accordance with the Commission's prior action.

The Chair reminded members that they should calendar additional Commission meetings as previously announced (2-day meeting for October 24-25, 2003 and a December 12TH video conference meeting).

B. Staff's Report

Staff reported on the Board of Governor's action in support of the policy of AB 1101 (Steinberg), a bill establishing an exception to an attorney's statutory duty of confidentiality that would permit disclosures to prevent criminal acts of death or serious bodily harm.

Staff addressed the issue of e-mail and hard copy distribution of Commission materials. A majority of members believed that e-mail distribution followed by regular U.S. Mail distribution was adequate and saved on the expense of express/courier distributions. It was understood that timely submission of agenda items was critical to allow staff to prepare the materials for sending. Ms. Betzner requested express/courier distribution due to e-mail limitations.

Staff provided a status report on the posting of tentatively approved rule drafts on the State Bar website. It also was announced that a new group e-mail system would be introduced soon to facilitate communication among members, staff and liaisons. Mr. Mohr invited members to contact him to obtain a WordPerfect macro that makes it easier to collect and save e-mail messages.

III. MATTERS FOR ACTION

A. Consideration of Rule 1-120X. New Rule Proposal Arising from Discussion of Rule 1-120 re Incorporating Case Law and B&P Code Provisions

Matter not called for discussion. No materials received.

B. RECORDING TIME - NEW RULE

The Commission considered a recommendation for a proposed new rule submitted by Mr. Voogd, in consultation with the Chair. Mr. Voogd's recommendation presented the following discussion draft.

> "Rule ___. Recording Time.
>
> A member shall maintain accurate records of time expended on legal services for a client where the member's fee is based in whole or in part upon the time expended by the member or where the client requests the maintenance of such records. Such records shall be founded upon written or electronic notations made contemporaneously with expending the time and shall briefly describe the particular services provided. Copies of such records shall be provided to the client promptly upon request."

The Chair asked for a discussion of whether the concept of this proposal should be pursued? Among the points raised during the discussion were the following:

(1) As a disciplinary rule, there are interpretation problems that would need to be addressed by further drafting.

(2) The Commission must determine whether this rule is needed given the legal profession's current industry practices.

(3) Bus. & Prof. Code §6148(B) obviates the need for this rule.

(4) The proposed standard of contemporaneous record-keeping would be impossible to meet in actual practice.

(5) Consideration should be given to a different approach that focuses on the problem of falsified billing practices.

(6) The proposal includes one component that is not addressed in existing authorities and that is a requirement for maintaining billing records. Rule 4-100 sets a records retention standard for trust account records but there is no comparable standard for billing records.

(7) In evaluating this proposal, the Commission should review the State Bar Court's interpretation (in the *Fonte* case) of an attorney's duty to render an appropriate accounting.

(8) Regarding assumptions about an onerous burden imposed by a contemporaneous record-keeping standard, medical doctors seem to have developed methods for similar documentation practices and this may be a model for considering possible changes in law firm culture.

(9) It is not uncommon to find, in both civil and State Bar matters, that lawyers and their clients have not kept or have destroyed billing records.

Following discussion, it was agreed that Mr. Voogd would consider all of the comments and prepare a revised recommendation. Ms. Peck volunteered to serve as back-up on the assignment.

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C. Consideration of Rules: 1-300 (Unauthorized Practice of Law); 1-310 (Forming a Partnership With a Non-Lawyer); 1-320 (Financial Arrangements With Non-Lawyers); and 1-600 (Legal Service Programs)

Mr. Tuft summarized the proposed format for an organized presentation of the issues as discussed by the subcommittee. Ms. Peck began by presenting RPC 1-300. Comments were requested on the issue of whether RPC 1-300(B) should be deleted. Among the points raised during the discussion were the following:

(1) Former ABA MR 5.5 is consistent with current RPC 1-300(B) but the ABA's new MR 5.5 represents an MJP concept that is, at best, difficult to address without dealing with California's statutory prohibitions against UPL.

(2) The potential direction of the Supreme Court reflected in the California MJP Task Force report effectuates a regulatory shift that cannot be ignored in evaluating the continued vitality of RPC 1-300(B).

(3) Although neither the new MR 5.5 nor the California MJP Task Force embraces a full reciprocity concept, federal law developments in the form of GATS and WTO are moving in that direction at least at the international level.

(4) The emerging problem of virtual UPL based on rapidly evolving communication technologies also must be considered if the Commission's amendments in this area are to stand the test of time.

(5) Consideration should be given to the historical resource limitations on agency enforcement of UPL both by the State Bar and public prosecutors. Also, the higher burden of proof in a criminal UPL prosecution must not be forgotten.

(6) UPL by a California lawyer which occurs in another state is the problem of that other state and should not be regarded as a primary concern for California regulation or enforcement, in part, because California has a lot of in-state violations that need attention.

(7) RPC 1-300(B) has continued vitality as a stand alone proposition; however, the question is whether it can or should be enhanced to address the issues covered by MR 5.5(c).

(8) Two obstacles constrain the efficacy of this Commission's efforts to reform the policy reflected by RPC 1-300: (i) the Legislature's longstanding statutory control over UPL prohibitions; and (ii) the pendency of the California Supreme Court's MJP reforms, presumably through new rules of court and not through the RPCs.

(9) Abrogation of B&P §6125 through a RPC amendment does create an apparent conflict of law; however, B&P §6126(a) makes clear that a person who is not an active member of the State Bar may be "authorized pursuant to statute or ***court rule*** to practice law in this state," and RPCs are rules adopted by the Supreme Court.

(10) RPC 1-300(B) should be retained and regarded as a counterpart to MR 5.5(A) with consideration given to adopting the MR 5.5(a) language.

(11) Assuming that the policy will be preserved, the language of RPC 1-300(B) should only be changed for a clear and compelling reason as that language is among the oldest rule language currently found in the California rules.

(12) The European model should be considered as an option for abrogating local barriers to the practice of law.

Following discussion, the Chair called for a consensus vote on the issue of whether the concept of RPC 1-300(B) should be retained. The Commission voted to retain the rule by a vote of 7 yes, 3 no and no abstentions. The Commission also voted to direct the codrafters to use the language of MR 5.5(a) to revise RPC 1-300(B) by a vote of 7 yes, 1 no and 1 abstention. As contemplated by this vote, the language would be:

> "A member shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction."

The subcommittee next presented RPC 1-300(A). Ms. Peck asked for comments on whether this rule should be retained and offered the following reasons for deleting the rule: (i) RPC 1-120 adequately covers aiding violations of the State Bar Act; and (ii) any amendment to existing RPC 1-300(A) aimed at expanding or strengthening the prohibition would garner anti-competition criticism even though a state action exception would apply. Among the points raised during the discussion were the following:

(1) The Discussion section to RPC 1-120 could be amended to make clear that RPC 1-300(A) violations are covered.

(2) MR 5.5 goes well beyond both subdivision (A) & (B) of RPC 1-300 and deleting subdivision (A) has the appearance of moving further out of synch with the ABA.

(3) RPC 1-300(A) should be retained. Changing RPC 1-300(A) to a conceptual subset of RPC 1-120 has the effect of denigrating the importance of the RPC 1-300(A) prohibition. This is true even if the RPC 1-120 Discussion section is amended to include an express reference. RPC 1-300(A) has existed as a stand-alone rule for many years. It addresses an issue that no one disputes: aiding another to commit UPL. The mere fact that the definition of UPL is evolving does not change the longstanding central nature of the RPC 1-300(A) prohibition.

(4) Whether or not the rule is retained, consideration must be given to the apparent non-compliance by large firms that are entangled with individual non-lawyer professionals and/or affiliated non-lawyer entities.

(5) Assuming that RPC 1-300(A) works conceptually as a subset of RPC 1-120, there are drafting differences that must be resolved, i.e., "not aid" v. "knowingly assist in, solicit, or induce." Care must be taken that this change does not lead to inadvertent substantive changes.

(6) MR 5.5(a) contains a component not present in the California rules, that is, a prohibition against aiding in the UPL in another jurisdiction. To track the ABA, RPC 1-300(A) must be retained and expanded to cover this additional component.

(7) RPC 1-300(A) represents a correct principle and thus far no one has articulated a compelling reason to delete it.

(8) Why does RPC 1-300(A) occupy such an elevated status? RPC 1-120 stands for the principle that it is unethical conduct for an attorney to assist in any State Bar Act violation. Isn't assisting a violation of §6106 just as reprehensible as aiding in the UPL? As a basic ethical precept, should these relative distinctions even be considered?

(9) The terms of RPC 1-300(A) should be amended to prohibit aiding an "entity" in the UPL.

(10) Rather than crafting a definition of the "practice of law" for purposes of RPC 1-300, the rule should just state the "practice of law" means whatever the courts and the legislature have determined to be the "practice of law."

(11) UPL is a national problem and the ABA has attempted a national response by way of its MJP reforms. The Commission cannot deal with RPC 1-300 without directly addressing MJP.

Following discussion, the Commission rejected, by a vote of 3 yes, 5 no, with 1 abstention, a proposal to delete RPC 1-300(A) and to add Discussion section language to RPC 1-120 clarifying that the former prohibition is covered by that rule.

Having addressed RPC 1-300(A) and (B), the Chair indicated that discussion of the subcommittee's report will continue at the next meeting.

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D. Consideration of Rule 1-311. Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

Mr. Voogd presented his April 7, 2003 memorandum reporting on RPC 1-311 rule amendment issues. As set forth in this memorandum, the rule amendments offered for consideration were: (1) replacing the erroneous reference to "6203(c)" in subparagraph 1-311(A)(2) with a correct citation to "6203(d)(1)"; and (2) amending paragraph (D) to add a statement that the information contained in notices submitted to the State Bar in compliance with the rule are available to the public. In addition, possible modifications to the State Bar's notice form were referred to staff. Among the points raised during the discussion of Mr. Voogd's report were the following:

(1) Added in 1996, RPC 1-311 is a relatively new rule. The adoption of RPC 1-311 by both the State Bar Board of Governors and the Supreme Court involved resolution of divisive policy issues memorialized in the State Bar's December, 1995 rule filing. Regardless of the Commission's views on the merits of the policy issues, it is too soon to recommend that the State Bar Board and the Supreme Court revisit the controversial aspects of this rule.

(2) The client notification provision should be deleted or, at the very least, made more prominent so that it is not a disciplinary trap.

(3) Subparagraph (B)(2) raises an access to justice concern because a blanket prohibition against appearances before any "public agency" ignores the fact that many agencies permit admission by motion (including non-lawyer lay advocates) and parties should not be constrained in exercising a lawful right to choice of counsel.

(4) The rule should be changed to simply ban associations where a tainted lawyer's activities would violate statutory UPL prohibitions.

(5) Absent a realistic chance of a change in the resolution of the divisive policy issues, the Commission should make minor fixes and move on.

(6) The requirement for providing notice to clients is a public protection component that should not be eliminated merely because compliance is viewed as problematic for the lawyer who is employing or affiliating with a "tainted lawyer."

(7) Statistics collected by Ms. Yen indicated that lawyers are complying with the rule.

(8) The modern legal market is a tight one and, over time, this rule likely will be a severe obstacle to rehabilitation, particularly with the competition of out-of-state lawyers that will follow implementation of MJP reforms.

(9) The client notification provision should be replaced with a "no client contact" restriction. This was the formulation of the original State Bar Office of Trial Counsel proposal.

(10) California was the first state to adopt this type of a rule and other states have followed California's lead. It may be regarded as odd if California retreats on this front.

(11) The State Bar's Office of the Chief Trial Counsel has suggested changing paragraph (F) to refer to "termination of employment" rather than "termination of the disbarred. . . member."

(12) There must be some record of the Commission's consideration of re-working the mean-spirited, draconian aspects of RPC 1-311.

(13) A strict rule is appropriate if deterrence of unacceptable conduct is the objective.

(14) Changing the rule to make notices to the State Bar a public record would need to be done in a way that does not result in an indirect disclosure of confidential client information.

Following discussion, the Commission adopted, by a vote of 7 yes, 2 no, with 1 abstention, Mr. Voogd's proposal to: (1) replace the erroneous reference to "6203(c)" in subparagraph 1-311(A)(2) with a correct citation to "6203(d)(1)"; and (2) amend paragraph (D) to add a statement that the information contained in notices submitted to the State Bar in compliance with the rule are available to the public.

A proposal to delete the last two sentences of paragraph (D) (re client notification) and all of subparagraph (C)(2) (re restrictions on client contact) was defeated by a vote of 3 yes, 7 no with no abstentions. Also, a proposal to delete the term "public agency" from subparagraph (B)(2) was defeated by a vote of 2 yes, 8 no with no abstentions. The Chair assigned the codrafters to consider the Commission's discussion and votes and prepare a proposed amended rule for consideration at the next meeting.

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E. Consideration of Rule 1-400. Advertising and Solicitation

The codrafters presented their report on RPC 1-400 rule amendment issues (see April 15, 2003 e-mail from Mrs. Julien and April 17, 2003 memorandum from Mr. George). As set forth in the memorandum, there was a general recommendation that RPC 1-400 be retained substantially in its current form. The codrafters also reviewed the case *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939 (re commercial speech protection). In addition to the matters reported by the codrafters, the Chair asked that the members consider the issues enumerated in Mr. Tuft's April 30, 2003 e-mail message. Among the points raised during the discussion were the following:

(1) COPRAC's opinion (State Bar Formal Op. No. 2001-155) finds that the existing rule applies to internet websites and this means that only clarifying changes may be needed.

(2) In addition to websites, all forms of new communication technologies must be considered including: internet chat rooms; e-mail; listservs; bulletin boards; and instant message capabilities.

(3) Regarding websites, the issues of: domain names; off-site links; meta-tags/invisible ink; and interactive information retrieval systems should be considered.

(4) Chat room communication was a controversial issue for ABA Ethics 2000 and meta-tags may be more of a fraud/moral turpitude issue rather than deceptive advertising.

(5) The retention requirement for electronic communications needs to be addressed in terms of practicality and consistency between RPC 1-400(F) (2 year requirement) and Bus. & Prof. Code §6159.1 (1 year requirement).

(6) ABA Ethics 2000 treated a domain name as a "trade name."

(7) Consideration should be given to an exception for lawyer-to-lawyer communications.

(8) Consideration should be given to specifically addressing communications in the class action context.

(9) The standards pursuant to paragraph (E) should be reviewed.

(10) The codrafters should make a recommendation accounting for the overall consistency, or lack thereof, between RPC 1-400 and the State Bar Act.

(11) The advent of MJP and interstate advertising militates in favor of national uniformity in state advertising rules.

(12) The concept of RPC 1-320(B) ought to be moved to RPC 1-400.

Following discussion, there was a general consensus that the codrafters should account for all of the issues identified on Mr. Tuft's April 30, 2003 e-mail message and, particularly, that the following action be taken:

(1) Update the rule to address fully the new technology issues;

(2) Clarify "telephone" communications for purposes of the rule: Does it mean live person contact of automated/recorded contact;

(3) Draft proposed rule text to address domain names and make a recommendation on whether RPC 1-400 is an appropriate rule for addressing meta-tags;

(4) Draft an exception for direct lawyer-to-lawyer communications;

(5) Make a recommendation addressing retention requirement issues;

(6) Make a recommendation on whether subparagraph (B)(2) should be retained in its current form (i.e., address whether the potential standard of real-time interactivity meets constitutional muster consistent w/ *Ohralik* and other similar cases);

(7) Make a recommendation on whether any standards should be moved into the text of the rule; and

(8) Consider written comment No. 2002-03 (E-mail from Neville Johnson).

The Chair encouraged the codrafters to begin promptly the task of addressing all of the above matters. Mr. Mohr volunteered to distribute information regarding meta-tags.

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F. Consideration of Rule 1-120. Assisting, Soliciting, or Inducing Violations

The Chair indicated that two objections were received in response to the RPC 1-120 mail ballot and, as a result, the Chair was exercising his prerogative to discuss the rule for the limited purpose of possibly modifying the draft and restarting a mail ballot in accordance with the Commission's prior action. The Chair directed members to the mail ballot circulated by staff on April 24, 2003. That mail ballot provided the following proposed amended rule:

> **Rule 1-120. Assisting, Soliciting or Inducing Violations and Reporting Professional Misconduct.**
>
> (A) A member shall not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act.
>
> (B) A member may, but is not required to, report to the State Bar the misconduct of another lawyer unless precluded by these rules or other law.
>
> Discussion
>
> [1] In deciding whether to report misconduct, a member may consider whether another lawyer has committed a violation of these rules or the State Bar Act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.
>
> [2] This rule is not intended to allow a member to report the misconduct of another lawyer if doing so would violate the member's duty of protecting confidential information of a member's client as provided in Business and Professions Code section 6068, subdivision (e), or would prejudice the interests of the member's client, or would involve the unauthorized disclosure of information received by the member in the course of participating in an approved lawyer's assistance program.
>
> [3] As to testing the validity of any law, rule, or ruling of a tribunal, see Rule 3-210.

The Chair requested discussion of the objections raised to the mail ballot. Among the points raised were the following.

(1) A mandatory reporting rule is preferable to the current proposed compromise approach.

(2) Modifications can be made to address some clarification issues without revisiting the Commission's prior determination on mandatory reporting.

(3) Although permissive, the current approach at least acknowledges that reporting is an option. Case law and California's prior determinations not to include a counterpart to the ABA reporting rule create the impression that California prohibits any reporting.

(4) Sometimes judges order attorneys to make reports.

(5) Everything after paragraph (A) is an "ethical consideration" concept and not appropriate for a disciplinary rule.

(6) The terminology needs to be cleaned-up for consistency, i.e., "violation", "these rules", "professional misconduct", and "misconduct."

(7) This rule may have an impact on self-reporting.

(8) The phrase "precluded by these rules or other law" could be clarified by referencing duties to a client.

(9) The proposed phrase "duty to a client" may need to be clarified to say "duty to a client or a former client."

Following discussion, the Commission voted (4 yes, 2 no, with 4 abstentions) on a proposal to adopt the following modified paragraph (B) for purposes of a 10-day mail ballot.

> "A member may, but is not required to, report to the State Bar the professional misconduct of another lawyer unless precluded by the member's duties to a client, or a former client, or by law."

The Commission next voted (4 yes, 0 no, with 6 abstentions) on a proposal to delete the word "professional" in the above language.

Lastly, the Commission adopted, by a vote of 7 yes, 0 no, with 3 abstentions, a proposal to substitute the following text for the above modified paragraph (B).

> "A member may, but is not required to, report to the State Bar a violation of these rules or the State Bar Act unless precluded by the member's duties to a client, or a former client, or by law."

The Chair assigned Mr. Lamport (lead), Ms. Betzner, and Mr. Tuft to work with staff and Mr. Mohr to implement the modifications in a new draft (including conforming changes to the Discussion section) that staff will use to re-start the 10-day mail ballot circulation in accordance with the Commission's prior action.